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charter party or to charter the ship, and plaintiff sued for damages resulting from such refusal. *Held*, an enforceable contract had been entered into by the parties, though both intended it should be reduced to writing and signed *American Hawaiian S. S. Co. v. Willfuehr et al.* (1921), 274 Fed. 214.

"It is everywhere agreed to be possible for parties to enter into a binding informal or oral agreement to execute a written contract. It is also everywhere agreed that if the parties contemplate a reduction to writing of their agreement before it can be considered complete there is no contract until the writing is signed." WILLISTON ON CONTRACTS, Sec. 28. Between these two clear situations ambiguous ones arise which lead to differences of opinion. The ultimate question in such cases, however, is one of fact as to the intention of the parties. If the written draft is viewed simply as a convenient record of an existing agreement, its absence does not affect the binding force of the agreement, there being no regulation by statutes; but if it is viewed as an essential part of, and a consummation of, the negotiations, there is no contract until the written draft is executed. *Miss., etc., Steamship Co. v. Swift*, 86 Me. 248; *Western Roofing Tile Co. v. Jones*, 26 Okla. 209; *El Reno Wholesale Grocery Co. v. Stocking*, 293 Ill. 494; *Prince v. Blisard* (Texas, 1919), 210 S. W. 301. See 29 L. R. A. 431 *et seq.* In some cases the fact that the parties contemplated that a formal agreement should be prepared and signed has been regarded as "some evidence" that they did not intend to bind themselves until the agreement was reduced to writing and signed; in others it has been considered "strong evidence" of such a conclusion. *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Rossiter v. Miller* [1878], 3 App. Cas. 1124; *Ridgway v. Wharton*, 6 H. of L. Cas. 264. See 29 L. R. A. 437; Ann. Cas. 1912 B 131. In the principal case, and similar ones, where an enforceable contract has been held to have been made without the execution of the formal contract, it is at least impliedly recognized that the mere reference to such future formal contract does not negative the existence of a present contract. The court in the principal case considered that the plaintiff had shown an intention on the part of the parties to be bound by the oral agreement, and had sustained the burden of proof said to be upon him to sustain such a contention, particular notice being given to the fact that the defendant's manager had actually designated a place for the ship to dock.

CONTRACTS—ORAL VARIATION OF WRITTEN AGREEMENT WITHIN STATUTE OF FRAUDS—ESTOPPEL.—In a written agreement defendant promised to sell plaintiff a certain 480 acres of patented land, and, *inter alia*, to sell plaintiff 100 head of cattle to be selected by plaintiff out of defendant's herd. Plaintiff paid \$500 down. A day or two after the execution of the agreement, and nearly a month before defendant was to perform, he discovered that he could not pass a clear title to a part of the land. Accordingly, the parties entered into an oral adjustment as to this. While defendant was holding the cattle to be ready to perform he had opportunities to sell them. Before the date of performance a severe drought occurred, causing him heavy losses on his animals. On the date of performance plaintiff refused to complete pay-

ment and now sues for the recovery of his deposit, claiming that the defendant is barred from setting up the revised contract because it does not satisfy the Statute of Frauds. Judgment given for the defendant. *Held*, the plaintiff was estopped to set up the statute as to the variation. *Vaughan v. Jackson* (N. Mex., 1921), 200 Pac. 425.

In arriving at its decision the court quotes from *Kingston v. Walters*, 16 N. Mex. 59, saying: "Where a representation as to the future relates to an intended abandonment of an existing right and is made to influence others and they have been influenced by it to act, it operates as an estoppel." This doctrine can be traced to *Insurance Co. v. Mowry*, 96 U. S. 544, but it is unnecessary to the decision of that case and is a misleading *dictum*. In the principal case, however, the court was forced to resort to some device such as estoppel. By the great weight of authority no action will lie on an oral variation of a written contract if the varied agreement is within the Statute of Frauds. *Odell v. Barton*, 249 Fed. 604; *Swain v. Seamens*, 9 Wall. 254; *Abell v. Munson*, 18 Mich. 305. A contract within the Statute may be rescinded orally. *Morris v. Baron & Co.*, 87 L. J. R. (K. B.) 145. But as was said in this case, it is essential that in the agreement for rescission there be made manifest "the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which still leaves it subsisting." See also *Morris v. Baron & Co.* [1918], A. C. 1, commented on in 16 MICH. L. REV. 624. Apparently many courts refuse to allow any application of estoppel to avoid the Statute of Frauds. *Warren v. Mayer Mfg. Co.*, 161 Mo. 112; *Platt v. Butcher*, 112 Cal. 634. But the better rule seems to be that one who has induced a breach by requesting performance to be different from that called for in the written contract is estopped to set up this breach. The leading case taking this view is *Hickman v. Haynes*, L. R. 10 C. P. 598, in which it was held that a buyer having by parol induced a seller, willing and able to perform, to delay until after the time called for in the written contract was barred from setting up the breach. In accord are *Faxton v. Faxon*, 28 Mich. 159; *Johnson v. Blair*, 132 Ala. 128; *Scheerschmidt v. Smith*, 74 Minn. 224. *Thomson v. Poor*, 147 N. Y. 402, goes further and says that the party who has consented to a different performance is estopped to assert that there was a breach; but there is strong authority contrary to this extension. *Walter v. Bloede*, 94 Md. 80. The principal case must rely on the disputed doctrine that estoppel will apply as against the party merely assenting to a request for a change in performance; but even conceding this to be the law, the court's decision is erroneous. Where courts allow estoppel at all, the party claiming its benefit must have been able to perform according to the terms of the written contract and must have withheld such performance on the faith of the other party's conduct. *Stowell v. Robinson*, 3 Bing. N. C. 928; *Lawyer v. Post*, 109 Fed. 512; *Plevins v. Downing*, 1 C. P. D. 220 (*dictum*); *Hasbrouck v. Tappen*, 15 Johns. (N. Y.) 200. In the principal case it was impossible for the vendor to deliver a good patent title to the land in question. Not having relied on the plaintiff's conduct as to acts which he was able to perform, he is not entitled to the benefit of estoppel to deny breach.